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The following index and digest contain the legal cases which have appeared in THE BANKING LAW JOURNAL during 1958. The entire arrangement, including the number of sections follows the plan of the fifth edition of the BANKING LAW JOURNAL DIGEST. The DIGEST, with Cumulative Supplement to Fifth Edition, contains the digest of more than 10,000 banking decisions which have been published in THE BANKING LAW JOURNAL from the time of its establishment in 1889 down to December, 1958.

## ACCEPTANCES

**§11. Retention of bill as acceptance.**

A drawee bank holding a check forwarded to it for collection from Thursday to Monday and then returning it because it was uncollectible, was not liable to the payee under a Florida statute indicating that a drawee is deemed to accept a bill delivered for acceptance where the drawee destroys or refuses to return the bill. General Finance Corp. v. Central Bank & Trust Co., Florida, 163 F.Supp. 372. 75 B.L.J. 1054.

If evidence showed a drawee bank did not have knowledge of the arrival of certain livestock, it would not be liable for holding drafts for longer than 24 hours since the bank's instructions were to hold the drafts for arrival of the livestock. Tyler Bank & Trust Company v. Saunders, Texas, 308 S.W.2d 90. 75 B.L.J. 791.

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## ASSIGNMENTS

**§94.5. Assignment of accounts receivable.**

The maintenance by an assignee bank of a 4-to-3 collateral to debt ratio in the form of assigned receivables and/or money in the collateral account, the hiring by the bank of its own agent in the assignor company to handle collections of the accounts, and the keeping of current records of the assigned accounts showed sufficient policing of the accounts to sustain the validity of the bank's security interest and to avoid the imputation of fraud as found in Benedict v. Ratner, 268 U.S. 353. New Haven Clock & Watch Co., First National Bank of Chicago v. O'Keefe, Trustee, United States Court of Appeals, Second Circuit, 253 F.2d 577. 75 B.L.J. 949.

**§95. Assignment of contract.**

An assignee bank will prevail over a surety company which claims priority to funds by an assignment of rights in a government contract contained in the surety's bond agreement since such an assignment to the surety is invalid under 41 U.S.C.A. Sec. 15 and since a contractor's banker is not bound to see to the application of the proceeds of checks constituting payment under government contracts. United States Casualty Co. v. First National Bank of Columbus, Georgia, 157 F.Supp. 789. 75 B.L.J. 505.

**§98. Notice of assignment.**

Contract rights assigned to a California bank did not constitute an account within the meaning of California Statutes Sec. 3017 and as a consequence the assignment did not have to be recorded. Costello v. Bank of America Nat. Trust & Savings Assn., United States Court of Appeals, 246 F.2d 807. 75 B.L.J. 33.

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## ATTORNEY'S FEES

**§109. Provision in instrument for attorney's fees held valid.**

A provision in a conditional sale contract calling for the payment of attorney's fees was valid and an assignee of the contract could recover an attorney's fee out of the proceeds of the sale of the conditionally sold property, although the

court reserved the right to pass on the reasonableness of such fees. In the Matter of Pack-It, Inc., United States District Court, New Jersey, January 20, 1958. 75 B.L.J. 716.

**§111. Recovery of attorney's fees.**

Attorney's fees could be recovered by a mortgagor from the mortgagee under a penal statute requiring a mortgagee to pay all damages to the mortgagor where the mortgagee in bad faith refused to satisfy a mortgage of record. Head v. Crone, Supreme Court of Idaho, March 25, 1958. 75 B.L.J. 715.

Where a note provided the maker would pay attorney's fees if it became necessary to put the note in an attorney's hands for collection or suit but the maker was not told the holder had chosen to accelerate the note for non-payment of one installment and was not given a chance to pay the entire note before suit was brought, the maker was not liable for the attorney's fee. St. Charles Dairy, Inc. v. Jerome A. Hayes, Jr., Louisiana, 96 So.2d 494. 75 B.L.J. 139.

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## BANKING

**§119. State control of banking business.**

State bank superintendent may in his discretion withhold information concerning the financial status of a state savings and loan association under Section 36, subdv. 10 of New York Banking Law even though such information bears on the release of association shares from a subordination contract. Clark v. Mooney, 169 N.Y.S.2d 321. 75 B.L.J. 801.

The question of whether or not state or federal courts have jurisdiction to decide the issues in a case involving alleged monopolistic activity of a national bank against a state bank cannot properly be decided in a state court on a motion to dismiss the complaint. Peoples Savings Bank v. Stoddard, Michigan National Bank et al., Michigan, 88 N.W.2d 462. 75 B.L.J. 682.

A federal district court does not have original jurisdiction to entertain a quo warranto proceeding brought by a state to test the validity of an action of a federally chartered savings and loan association. United States of America ex rel. State of Wisconsin v. First Federal Savings. & Loan Assn. and Federal Home Loan Bank Board, United States Court of Appeals, 248 F.2d 804. 75 B.L.J. 329.

**§127. —Practicing law.**

State and national banks will be prohibited from illegally practicing law where their activities would be commonly understood to be the practice of law and where the banks were not acting on their own behalf but on behalf of their customers. State Bar Association of Connecticut et al. v. Connecticut Bank & Trust Co. and Hartford National Bank & Trust Co., Connecticut, 140 A.2d 863, 144 A.2d 347. 75 B.L.J. 1035.

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## BANKRUPTCY

**§142. Preference within four months of bankruptcy.**

A voidable preference is created where a mortgagee in a foreclosure action takes possession of mortgaged property within four months of the mortgagor's bankruptcy. The mortgage was not perfected until the mortgagee took possession of the property which he was entitled to under the after-acquired property clause of the mortgage agreement. Curtis v. Knox, United States Court of Appeals, Seventh Circuit, March 5, 1958. 75 B.L.J. 895.

**§144. Recovery of money paid by insolvent estate.**

The trustee in bankruptcy of a bankrupt partnership is not an adverse claimant under a statute requiring such claimants to procure process against a bank or furnish a bond indemnifying the bank against loss for paying out funds held on deposit. First National Bank v. Butler, Arizona, 313 P.2d 421. 75 B.L.J. 49.

**§147. —Deposits of trust funds.**

Property conveyed to a bank for sale where it is agreed the proceeds of sale will be applied to pay off balance of loan and then distributed to borrowers, is held in trust for the borrowers and this trust may be enforced against the FDIC, which submitted voluntarily to the courts jurisdiction, even though suit was originally brought against the bank. Federal Deposit Insurance Corp. v. Myhre, United States Court of Appeals, 249 F.2d 887. 75 B.L.J. 602.

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## BRANCH BANKING

**§215. Bank as separate entity.**

Even with the approval of the Comptroller of Currency a national bank could not establish a branch bank in a community where the branch of a state bank was already in operation since the establishment of such national bank branch was prohibited by state law. National Bank of Detroit v. Wayne Oakland Bank, United

States Court of Appeals, Sixth Circuit, 252 F.2d 537. 75 B.L.J. 783.

In a criminal suit where a defendant was indicted for robbing a bank it was contended that the crime had not been committed because the facilities established by a national bank on an Air Force base were not banking facilities since branch banking was prohibited by Texas statute. The court ruled that the state statute did not apply because the operation "is not, and does not purport to be, a branch bank. . . . It is an arm and agency of the Federal Government . . . established by the . . . bank under its designation as financial agent of the Government." United States v. Papworth, Texas, 156 F.Supp. 842. 75 B.L.J. 627.

## CHECKS

**§276. Essentials of a valid check.**

The maker of an instrument charged with passing a worthless check was entitled to a new trial where the trial judge had erroneously charged the jury that it was immaterial whether or not the amount or payee had been filled in on the instrument if it had been given by defendant knowing he did not have sufficient funds in the bank. If the instrument was not a check, the crime charged could not have been committed. State v. Ivey, North Carolina, 103 S.E.2d 398. 75 B.L.J. 880.

## COLLECTIONS

**§329. Title of collecting bank.**

Where a bank receives from its depositor a check endorsed without restriction but deposited pursuant to the usual deposit slip wherein the bank agrees merely to act as a collection agent, but nonetheless, the bank before collecting the check allows the depositor to draw from the bank an amount equivalent to both his entire balance and the amount of that uncollected check, the bank is a holder for value of that uncollected check. Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co., Mass. 161 F.Supp. 790. 75 B.L.J. 873.

## CONTRACTS

**§359. Validity.**

The promise of a company president to pay company overdrafts made in consideration of a bank's implied promise to forbear bringing suit against the company constitute a binding contract which the bank can enforce in a court of law. Anglo California National Bank v. Far West Lumber Company & Gooch, California, 313 P.2d 10. 75 B.L.J. 41.

## CORPORATIONS

**§371. Authority of corporate officers.**

The drawer of a check payable to the order of a corporation and indorsed and cashed by him for his own use may not recover from the drawee bank on grounds that the president lacked authority to indorse company checks, since in Illinois the president of a company is presumed to have authority to execute any contracts which the corporation is empowered to make and the bank had no notice of the alleged lack of authority. Krantz v. Oak Park Trust & Savings Bank, Illinois, 147 N.E.2d 881. 75 B.L.J. 957.

**§372. —Authority to issue and indorse negotiable paper.**

The defense of lack of authority of a corporate officer to execute a promissory note is available to the alleged corporate maker of a note even against a holder in due course. Budelman v. White's Express & Transfer Co., New Jersey, 140 A.2d 552. 75 B.L.J. 861.

**§376. Officers executing corporate notes held personally liable.**

A corporate officer signing cognovit notes without designating that he was signing solely for the corporation is personally liable on the notes unless by clear and convincing evidence he can prove it was not intended that he be so liable. E. R. Johnstone Machinery Co. v. Owens Screw Products, Inc. and A. M. Donofrio, Ohio, 145 N.E.2d 559. 75 B.L.J. 335.

## DEPOSITS

**§389.1. Night depository agreement.**

The applicability of the terms of a night depository agreement to the alleged negligence of a bank in losing a night deposit cannot be determined until the facts of the loss are put in evidence because the exculpatory clause of such an agreement may not apply to all acts of negligence. Ramsey Outdoor Store, Inc. v. Chase Manhattan Bank, 169 N.Y.S.2d 772. 75 B.L.J. 774.

**§410. Public deposits.**

A depository bank properly refused to transfer county funds from a special fund to an officers' salary fund where the order directing such a transfer was void and unconstitutional. First State Bank & Trust

Co. v. Starr County, Texas, 306 S.W.2d 246. 75 B.L.J. 314.

A state statute providing for the deposit of inactive state funds in qualifying banks was not unconstitutional for violating the extension of credit inhibition in the Arizona Constitution because the statute provided for a deposit which could be withdrawn on demand. Valley National Bank v. First National Bank, Arizona, 320 P.2d 689. 75 B.L.J. 692.

**§435. —Missouri.**

A joint savings account with the right of survivorship was created where the name of a deceased joint depositor was stricken from the passbook and account ledger and a new name substituted and a new signature card bearing the account number was signed by another joint depositor. Dalton v. American National Bank, et al. Missouri, 309 S.W.2d 571. 75 B.L.J. 883.

**§440. —Ohio.**

The property rights in funds deposited in the name of two persons in an Ohio bank under a statute which indicates the bank may make payment to either of the depositors or the survivor are not determined by the contract with the bank and must be established by circumstances outside such contracts. Jones v. Neu, Ohio, 150 N.E.2d 858. 75 B.L.J. 969.

**§469. Payment to wrong person.**

Bank holding deposit claimed by alleged agents of depositor located in occupied country is entitled to interplead all known possible claimants to the funds under the 1948 Amendment to the Federal Interpleader Act of 1926, 28 U.S.C. Sec. 1335. A/S Kredlit Pank v. Chase Manhattan Bank, New York, 155 F.Supp. 30. 75 B.L.J. 304.

## DISCOUNT

**§472. Definition.**

Where a subsidiary bank of a bank holding company bought without recourse paper from a loan company which was also a subsidiary, the transaction involved a violation of the Bank Holding Company Act, Section 6(a) (4) and disqualified the subsidiaries from the exemption under Section 4 (c) (6) involving divestment of stock. Federal Reserve Bulletin, March 7, 1958. 75 B.L.J. 575.

**§472.1. Right to discount commercial paper.**

Although the discount of notes by a corporation other than a banking corporation is specifically proscribed by Section 131 of the New York Banking Law this proscription does not extend to a mortgage executed to secure discounted notes. County Industrial Corp. v. Francia, 164 N.Y.S.2d 415. 75 B.L.J. 245.

## EVIDENCE

**§478. Admissibility of evidence.**

An unambiguous promissory note given for consideration may not be varied by parol evidence indicating that the lender was to look to a third party for payment rather than to the makers or indorsers although oral evidence is admissable under Florida law to show the conditional delivery of a note. American National Bank v. The Knab Co., Wisconsin, 158 F.Supp. 695. 75 B.L.J. 960.

## FEDERAL DEPOSIT INSURANCE CORPORATION

**§536.5. Assessments.**

Despite the holding in Industrial Bank of St. Louis v. FDIC, 95 F.Supp. 916 a contract reserve account created for the purpose of securing a bank against default on dealer paper purchased by a bank was not includible in the FDIC tax base under the FDIC Act of 1935 because such an account does not come under the statutory definition of a taxable deposit. Federal Deposit Insurance Corp. v. Continental Illinois National Bank & Trust Co., United States Court of Appeals, 245 F.2d 567. 75 B.L.J. 220.

## FORGED PAPER

**§549. Forged paper in general.**

The payee of a note could not recover from a co-maker who signed the note on the condition that another co-maker's wife would also sign as principal where the wife's signature was forged, since the payee made the forgery possible by permitting the husband to take the note out of the payee's office to obtain the wife's signature. Public Loan Corp. v. Jacobs, Ohio, 144 N.E.2d 505. 75 B.L.J. 44.

**§560. Liability of drawee bank to drawer where check paid on forged indorsement.**

A drawee bank was not liable to it's depositor for paying a check containing the forged indorsement of a co-payee where the proceeds of the check went to the person for whom they were intended and to whom they would have gone had there

been no forgery. Commercial Credit Corp. v. Empire Trust Co., Missouri, 156 F.Supp. 599. 75 B.L.J. 484.

**§564. Drawee bank may recover money paid on forged indorsement.**

If a trust company pays money to its customer upon checks bearing forged indorsements the trust company could have a valid claim against the customer based on unjust enrichment caused by a mistake of fact. Krensky v. Pilgrim Trust Co., Mass., 149 N.E.2d 665. 75 B.L.J. 959.

**§572. Depositor's duty to examine returned vouchers and report irregularities to bank.**

Statute exonerating banks from liability for paying checks on forged indorsements unless given written notice of the forgery within two years involves substantive rather than procedural law. The statute is not a statute of limitations and applies to public corporations performing governmental functions. Housing Authority of Union City v. Commonwealth Trust Co. and The Trust Co. of New Jersey, New Jersey, 136 A.2d 401. 75 B.L.J. 321.

**§578. —Depositor's duty to give notice upon discovering forged indorsement.**

Where a bank paid a check to unauthorized persons the drawer company was required to give the bank notice of the forgery within one year after the return of the check voucher despite the fact that the guilty parties were directors of the company and themselves suppressed information concerning the unauthorized payment of the check. Gerber v. Continental Illinois National Bank & Trust Co., Illinois, 148 N.E.2d 597. 75 B.L.J. 987.

**§588. Check delivered to impersonator—rights of drawee bank.**

The imposter rule which states that where the drawer of a check has dealings with an impostor who assumes a false name, and the check is intended for the person with whom the drawer is dealing, payment of the check by the bank to such an impostor or on his indorsement will be authorized and binding on the drawer, is applicable to the federal government as the drawer of checks. Atlantic National Bank, et al. v. United States of America, United States Court of Appeals, 250 F.2d 114. 75 B.L.J. 675.

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**GUARANTY**

**§620. Release of guarantor.**

Guarantor of note is not entited to an extension of time in his liability on the note where an agreement was made to give the maker an extension on his obligation, since the guarantor had not specifically reserved the right to have his liability extended. Empire Millwork Corp. v. Lapides, Maryland, 155 F.Supp. 765. 75 B.L.J. 340.

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**HOLDERS IN DUE COURSE**

**§630. Holder must take without notice of defect.**

A person purchasing a check from a payee for value without notice that the check had been stopped or that the payee had not properly performed the contract under which the check had been paid, was a holder in due course despite the fact that he had recommended the payee to the drawer of the check as a competent workman. Boston Post Lumber Co. v. Rubin, 169 N.Y.S.2d 939. 75 B.L.J. 708.

**§653. —Fraud not a defense.**

In an action against makers of a note by a bank which held the note as a holder in due course the defense of fraud by the payee of the note could not be asserted by the makers. Prudential Savings Bank v. Tomassone, 164 N.Y.S.2d 620. 75 B.L.J. 246.

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**INDORSEMENTS**

**§695. Qualified indorsements.**

Where a note and mortgage were indorsed by a car dealer to an assignee without recourse, the assignee was entitled to collect the unpaid balance on the note from the dealer because the latter had failed to have the mortgage lien noted on the certificate of title to the vehicle where such notation was required by the reserve agreement and the local statute. Securities Acceptance Corp. v. Perkins, Supreme Court of Kansas, December 7, 1957. 75 B.L.J. 534.

An indorsement of a note accompanying a conditional sale contract is not qualified and the seller making the indorsement must repurchase the note unless the assignment was made using the language "without recourse" or similar language. Allison Ford Sales v. Farmers State Bank, Supreme Court of Iowa, December 17, 1957. 75 B.L.J. 442.

**§702. Warranties of general indorsers.**

A collecting bank was liable to a drawee bank on a check bearing the forged indorsement of a principal where the collecting bank guaranteed all prior indorsements and where the agent committing the forgery had no authority to set up an

account in the principal's name in the collecting bank. Provident Trust Company v. Interboro Bank & Trust Co., Pennsylvania, 133 A.2d 515. 75 B.L.J. 234.

## LIEN AND SET-OFF

### General Liens

**§821.2. Priority of liens.**

A garageman in Missouri had a common law lien on a vehicle for repairs prior to the lien of the conditional seller even though the vehicle was sold under a validly recorded conditional sale contract in Florida and even though the garageman had not complied with the requirements necessary to give him a garageman's statutory lien. Mack Motor Truck Corp. v. Wolfe, St. Louis Court of Appeals, 303 S.W.2d 697. 75 B.L.J. 75.

A mortgagee-finance company was entitled to possession of the mortgaged vehicle and to priority over the claim of second mortgagee bank where the finance company had taken an assignment of the certificate of title to the vehicle at the time of making the mortgage and where the purchaser of the vehicle who had executed a mortgage to the bank had never received the certificate of title. Bordman Investment Co. v. Peoples Bank of Kansas City, Missouri, Kansas City Court of Appeals, April 7, 1958. 75 B.L.J. 810.

The filing of a chattel mortgage 18 months after it was executed was not done within a reasonable time and was therefore invalid against an assignee for the benefit of creditors. Matter of Levy, N. Y. Supreme Court, Kings County, October 22, 1957. 75 B.L.J. 75.

The lien of a mortgage was prior to the lien of the United States Government for taxes and consequently the mortgagee had a superior claim to the proceeds of the mortgaged machinery sold by the mortgagor's trustee under an assignment for the benefit of creditors where the chattel mortgage was executed and properly recorded before the tax claims came into existence. Vermillion v. Brodrick, United States District Court, District of Kansas, March 26, 1958. 75 B.L.J. 895.

The lien of a seller under a title retention contract covering tractors was superior to the lien of the mortgagee of the tractors since the latter was required to look into the question of title to such chattels at the time of making the mortgage. It is not sufficient for the mortgagee to take the mortgagor's word for the fact that the title to the chattels is clear. Boynton Beach State Bank v. J. I. Case Co., Florida District Court of Appeals, December 23, 1957. 75 B.L.J. 716.

## MORTGAGES

### Chattel Mortgages

**§862. Chattel mortgages generally.**

A garageman in possession of a mortgaged vehicle in which he had installed certain parts was not entitled to enjoin the seizure and sale of the vehicle by the mortgagee because by the doctrine of accession the parts become an integral part of the vehicle on which the mortgagee had the prior lien. Roberts d/b/a Jena Auto Co. v. Williams, Louisiana Court of Appeal, Second Circuit, December 19, 1957. 75 B.L.J. 532.

An instrument designated as a conditional sale contract but given to secure a loan and containing a provision that the security could be repossessed and any payments under the contract retained as liquidated damages was a chattel mortgage, not a conditional sale contract. Harbel Oil Company v. Steele, Arizona Supreme Court, November 20, 1957. 75 B.L.J. 349.

Where a mortgagor mailed a payment to the mortgagee and inquired on the date the payment was due whether or not the mortgagee had received payment and was told the mortgagee did not yet know if it had been received, and where the mortgagee without contacting the mortgagor further, repossessed the mortgaged chattel, the mortgagor was entitled to both compensatory and punitive damages. Columbia Finance Co. v. Worthy, Municipal Court of Appeals, District of Columbia, 141 A.2d 185. 75 B.L.J. 895.

Where a seller sold machinery to a buyer by making false representations about the work capabilities of the machinery and the buyer sought rescission of the contract, the executing of a chattel mortgage covering the machinery was not a ratification of the sale contract because the mortgage was executed before the misrepresentations were discovered. Dallas Farm Machinery Co. v. Reaves, Texas Supreme Court, November 6, 1957. 75 B.L.J. 348.

A mortgagor was entitled to enjoin the sale of his property by the mortgagee where the acceleration provisions of the note and the mortgage were inconsistent resulting in its being impossible to tell how much of the note was actually due. Lee v. Howard Broadcasting Corp., Texas Court of Civil Appeals, September 12, 1957. 75 B.L.J. 163.

**§869. Time of filing.**

A second mortgage executed only a few hours after a first mortgage and recorded only 43 minutes after the first mortgage was entitled to priority over the first

mortgage because under the applicable recording statute one instrument is invalid as against a subsequent instrument acquired in good faith if the first instrument is not recorded at the time the second is executed. South Carolina National Bank v. Guest, South Carolina Supreme Court, February 24, 1958. 75 B.L.J. 627.

The lien of a judgment creditor of a mortgagor has priority over the lien of a mortgagee where the judgment was obtained and enrolled between the time the mortgage was executed and recorded. Brookhaven Bank & Trust Co. v. Gwin, United States Court of Appeals, Fifth Circuit, March 4, 1958. 75 B.L.J. 626.

Chattel mortgages were void as to the trustee in bankruptcy of the mortgagor where they were not filed within six and fifteen months of their executions and where credit was extended to the mortgagor during these periods. In the matter of Alton Milk Co., United States District Court, Western District of Missouri, December 13, 1957. 75 B.L.J. 626.

As a matter of law seven days is a reasonable time within which to file chattel mortgages. In the Matter of Varratos, United States District Court, Southern District of New York, December 12, 1957. 75 B.L.J. 625.

**§874. Validity of chattel mortgage.**

A chattel mortgage was void as against the receiver of a bankrupt mortgagor under Chapter XI of the Bankruptcy Act because between the time the mortgage was executed and recorded, only five days, a creditor acting in good faith who did not know of the mortgage extended credit to the mortgagor. The existence of this one creditor made the mortgage void under Michigan law as to this creditor and consequently voidable under the Bankruptcy Act as to all creditors. In the Matter of Valley City Furniture Company, United States District Court, W.D. of Michigan, April 17, 1958. 75 B.L.J. 1068.

**§878. Mortgage of goods not owned.**

A mortgagee did not have a security interest in after-acquired property and was consequently not entitled to a secured lien on the proceeds of sale of such property when it was sold by the mortgagor's receiver. Although the mortgagee contended that by implication the mortgage covered after-acquired property because anyone dealing with the mortgagor should know that the mortgagor's stock would be periodically replaced and that naturally the new stock was intended to be covered, the lack of express coverage by the terms of the mortgage indicated a lack of intention to include after-acquired property. Weiprecht v. Ripple, Maryland Court of Appeals, June 18, 1958. 75 B.L.J. 1068.

**§884. Sale of mortgaged property.**

A mortgagee repossessing mortgaged property and selling it at a forced sale who did not pay the excess of the proceeds of the sale over to the mortgagor was liable not only for the amount owed to the mortgagor but also for punitive damages even though the mortgagor did not prove that the mortgagee withheld the funds intending to do harm to the mortgagor. Watkins v. Leyton, Kansas Supreme Court, April 12, 1958. 75 B.L.J. 809.

A mortgagee was not entitled to a deficiency judgment against the mortgagor where the mortgaged property had been sold without benefit of an appraisal since such an appraisal was a prerequisite to a deficiency judgment even though the agreement between the parties did not require one. Atlas Finance Co. v. Whitehead, Louisiana Court of Appeal, January 6, 1958. 75 B.L.J. 534.

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**Real Estate Mortgages**

**§887. Real estate mortgages generally.**

A mortgagee bank which came to own the mortgaged property upon foreclosure could not have a court declare invalid a restrictive covenant on the land since the bank was aware of the restriction when it made the mortgage and since no change in the character of the neighborhood had made enforcement of the covenant inequitable. Baldwinsville Federal Savings & Loan Assn. v. Burns Farms, Inc., 165 N.Y.S.2d 650. 75 B.L.J. 868.

**§895. Foreclosure.**

A lender may, upon default of payment, realize on its security by foreclosing a mortgage given to secure the payment of notes, even assuming the notes are void for having been illegally discounted by a non-banking corporation in New York. Amherst Factors, Inc. v. Kochenburger, New York, 173 N.Y.S.2d 570. 75 B.L.J. 1051.

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**NATIONAL BANKS**

**§902. Powers of national banks generally.**

A national bank is not empowered by U.S. Code, Title 12, Sections 29 and 371d to object to the validity of a lease which it made on unfavorable terms since under those statutes only the Comptroller of the Currency may question whether or not such a transaction is ultra vires. Brodsky v. Perth Amboy National Bank, New Jersey, 156 F.Supp. 316. 75 B.L.J. 497.

## NEGLIGENCE

**§930. Liability for negligence.**

A jury could properly have found that a bank was negligent in placing a rubber mat likely to tip or shift on a step in front of its banking building and likewise could have found that the plaintiff in falling over such mat was not contributorily negligent because it was not apparent from looking at it that it would so tip or shift. Gray, Adm'r of Estate of Peddycoart v. First National Bank, Minnesota, 85 N.W.2d 668. 75 B.L.J. 403.

Where a savings and loan association was sued by a customer who sustained injuries by slipping on the association's floor which had been highly waxed and polished by a waxing company and a jury awarded damages to the customer, the association could recover over against the floor waxing company which had caused the accident. Sieden v. Savings & Loan Association of Sunnyside City, 172 N.Y.S.2d 403. 75 B.L.J. 1004.

A bank may be liable for injuries to a customer which are the direct results of a bank officer's assault on the customer where the bank was negligent in employing or retaining the officer when the bank knew or should have known of the officer's quarrelsome and antagonistic nature. Murray v. Moduc State Bank, Kansas, 313 P.2d 304. 75 B.L.J. 114.

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## NEGOTIABILITY

**§936. Stipulations in general not affecting negotiability.**

After evidence of a defense has been introduced a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course and this applies where a note upon which judgment has been entered by confession has allegedly been induced by fraud and where the indorsee of the note allegedly had notice of the intended dishonor of the note before negotiation. First Pennsylvania Banking & Trust Co. v. DeLise, Pennsylvania, 142 A.2d 401. 75 B.L.J. 983.

Notes otherwise negotiable are not rendered non-negotiable by including a statement that they were tendered in settlement of insurance premiums, that if any of the notes were not paid they all became due and that the unearned premiums became the property of an insurance agency since this statement did not make the payment of the notes conditional. Citizens & Southern National Bank v. Johnson, Georgia, 104 S.E.2d 123. 75 B.L.J. 965.

**§964. Recital that note is negotiable.**

A note which would have been otherwise non-negotiable because it did not contain the usual "or order" or "to the order of" was negotiable because it contained a legend that it was negotiable and payable at a bank. Spillers v. Lafever, Alabama, 103 So.2d 837. 75 B.L.J. 965.

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## NON-NEGOTIABLE PAPER

**§978. Non-negotiable paper.**

Bank which paid conditional draft and then was unable to obtain payment from the drawer because the condition was not met could not recover from indorsers under NIL §66 since the instrument was non-negotiable. Banks of America v. Butterfield, South Dakota, 88 N.W.2d 909. 75 B.L.J. 615.

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## OFFICERS AND EMPLOYEES OF BANKS

**§1077. Liability of bank for acts of officers or employees.**

A depositor may not recover in a malicious prosecution suit against a bank where it was shown the criminal proceedings against the depositor were not caused by the bank, that such proceedings were not terminated in favor of the depositor and where no malice was proved in regard to the bank's actions. Davidson et al. v. First State Bank et al., Texas, 310 S.W.2d 678. 75 B.L.J. 704.

A bank is liable to the payee of certain protested checks for failing to disclose to the payee the true financial condition of the drawer of the checks. Sparks v. Guaranty State Bank, Kansas, 318 P.2d 1062. 75 B.L.J. 316.

**§1079. —Liability for acts of vice-president.**

A bank is liable for assisting the officer of a corporation to carry out a fraudulent scheme in inducing stockholders to sell their stock for less than real value where a bank officer loaned banks funds with knowledge that corporate assets were to be used for the personal advantage of the company president. Judson et al., v. Peoples Bank & Trust Co., New Jersey, 134 A.2d 761. 75 B.L.J. 393.

**§1113. —Right of director to inspect books.**

The director of a savings and loan association is entitled to inspect the records of the association but this right does not extend to the director's personal accountant or attorney without prior proof of mismanagement. Pacent v. Fourth Federal

Savings & Loan Assn., 167 N.Y.S.2d 550. 75 B.L.J. 701.

## OVERDRAFTS

**§1147. Rights of bank against depositor where account overdrawn.**

In Texas, a community property state, a wife is liable to a bank on an overdraft that was occasioned in part by the non-payment of a check of her husband which had been deposited in the wife's account. Preston State Bank v. Finberg et ux., Texas, 305 S.W.2d 654. 75 B.L.J. 407.

## PAYEE

**§1202. Construction of instrument as to payee.**

Under N.I.L. Section 9 a check is payable to bearer where it is payable to the order of a fictitious person and such fact was known to the person making it so payable and under Florida law the payee named in an instrument will be considered fictitious though designating an existing person as payee, if there was no intent that the payee should have an interest in the instrument. Florida National Bank v. Geer, Florida, 96 So.2d 409. 75 B.L.J. 132.

## PAYMENT

**§1208. Payment in general.**

Where the holder of a check presents it to the bank at which it is payable, received the money, and surrenders the paper, the transaction is completed and cannot be rescinded except for fraud or mutual mistake. Manufacturers Trust Co. v. Diamond, 169 N.Y.S.2d 941. 75 B.L.J. 624.

The conditional payee of a bank draft cannot recover the amount of the draft from the drawer bank which had agreed with the purchaser of the draft to stop payment on it where the payee could not prove its title to the draft since the condition had not been fulfilled. International Firearms Co., Ltd. v. Kingston Trust Co., 175 N.Y.S.2d 794. 75 B.L.J. 1057.

**§1209. —Liability of party other than drawee.**

If the payee of a check has knowledge that there are no funds on deposit to meet it and the bank pays the check in ignorance of that fact, there may be a recovery of the payment. Farmers and Merchants Bank v. Universal C.I.T. Credit Corp., Utah, 315 P.2d 653. 75 B.L.J. 13.

**§1233. —Stale check.**

A bank was not liable for paying a five months old check where the drawer of the check had executed a three month stop payment order and then had not renewed it so as to be effective at the time of payment. Feller v. Manufacturers Trust Co., 163 N.Y.S.2d 512. 75 B.L.J. 231.

**§1240. —Check kiting transaction.**

A court will render a judgment notwithstanding the verdict of a jury in a case where the factual evidence shows that two checks upon which a depositor of an insolvent bank based a claim against the FDIC were in fact part of a check kiting scheme. Falconi v. Federal Deposit Insurance Corp., Pennsylvania, 153 F.Supp. 867. 75 B.L.J. 20.

**§1245. Bank's liability for refusing depositor's check.**

Drawee bank is liable to payee of check for refusing payment where it was proved that bank paid other checks presented after the plaintiff payee's check had been presented and left with the bank for payment. First Strawn National Bank v. Glidewell, Texas, 307 S.W.2d 297. 75 B.L.J. 412.

## PLEDGE AND COLLATERAL

**§1269. Pledge and collateral in general.**

Where a bank made a loan to a car dealer in exchange for a collateral note under which certain automobiles to be purchased in the future were pledged as collateral but where the automobiles were attached by a creditor of the dealer before delivery to the bank, the lien of the attaching creditor was senior to the lien of the bank. Beardsley v. Lowe & First National Bank, Kentucky, 156 F.Supp. 500. 75 B.L.J. 518.

## SALES

**§1357.5. Condition sales contracts.**

The assignee of a conditional sale contract was entitled to possession of property subject to the contract in a replevin action against the buyer despite the latter's objection that he was entitled to possession until the down payment was refunded, since the only issue in question in a replevin suit is the right to possesson of property. Universal C.I.T. Credit Corp. v. Goforth, Tennessee Court of Appeals, January 9, 1958. 75 B.L.J. 533.

An opinion of the Attorney General of Virginia indicates that equipment leases are to be characterized as conditional sales

contracts and are entitled to be recorded as such where the leases contained an option price, were executed for a definite term, provided for repossession, releasing and deficiency payments. Attorney General's Opinion, Virginia, November 1, 1957. 75 B.L.J. 164.

Conditionally sold butane tank equipment which was attached to a tractor so that it could not be taken off without injury to the tractor passed by accession to the conditional seller of the tractor upon repossession. Sasia and Wallace, Inc. v. Scarborough Implement Co., California District Court of Appeal, October 8, 1957. 75 B.L.J. 164.

The assignee of conditional sale contracts was denied a summary judgment in a suit where the buyer under the contracts questioned both the sufficiency of the notice of the sale of the conditionally sold property and the reasonableness of the expenses connected with the sale. Since the buyer is entitled to have these two items determined by court, the suit could not be dismissed on a motion for summary judgment. Franklin National Bank v. Petit, New York Supreme Court, May 15, 1958. 75 B.L.J. 896.

Where it was determined that alleged lease agreements were in fact conditional sale contracts because the leases contained provisions giving the lessee an option to purchase and specifying the credit to be given against the purchase price for past rentals paid, the court ruled that the lease agreements should have been recorded as conditional sale contracts. Since they had not been recorded, the lessor could not maintain a replevin suit against a bona fide mortgagee. American Can Co. v. U. S. Canning Corp., Municipal Court of the City of New York, 170 N.Y.S.2d 727. 75 B.L.J. 896.

A conditional sale contract properly filed with the state Prothonotary but not also filed with the Secretary of the Commonwealth as required by the Pennsylvania Uniform Commercial Code until after the conditional buyer was adjudicated bankrupt does not constitute a lien senior to the lien of the buyer's trustee in bankruptcy. In the Matter of Luckenbill, United States District Court, E. D. of Pennsylvania, November 13, 1957. 75 B.L.J. 349.

Where assignee of conditional sale contract repossessed vehicle and delivered it to dealer under circumstances from which the dealer's authority to sell could be implied, and the assignee repossessed the vehicle from a second purchaser, the assignee was liable for conversion. Budget Plan, Inc. v. Savoy, Massachusetts Supreme Judicial Court, November 6, 1957. 75 B.L.J. 257.

The assignee of a conditional sale contract could repossess conditionally sold goods and then recover a deficiency under the contract because a valid provision in the contract permitted such action even though without it resorting to the repossession would have constituted an election of remedies and as such would have precluded recovery for the deficiency. Selected Investments Corp. v. Anderson, Oklahoma Supreme Court, November 19, 1957. 75 B.L.J. 348.

Where an agent of the holder of a conditional sale contract entered the home of the conditional buyer for the purpose of repossessing the conditionally sold chattel after default under the contract and after the act of repossession walked further into the house of the buyer who was asleep, the buyer was not entitled to damages for an alleged trespass by the agent since the conditional sale contract provided for the peaceful entry of the buyer's premises for the purpose of repossession upon default. Williams v. General Electric Credit Corp., California District Court of Appeals, April 18, 1958. 75 B.L.J. 996.

A conditional seller could not repossess conditionally sold property and then recover for defaulted payments under the sale contract because the repossession constituted an election of remedies which excluded the possibility of recovery for the payments. Johnson v. Sanderson, Montana Supreme Court, November 4, 1957. 75 B.L.J. 348.

A conditional sale contract held by the assignee was void as to the conditional buyer's trustee in bankruptcy because the contract had not been recorded in Texas where the goods covered by the contract were located at the time of the sale although it was recorded in Illinois where the buyer signed it. The seller's reserved title depends upon the law of the place where the goods are located at the time of sale. Steen v. Grace, United States Court of Appeals, Seventh Circuit, July 8, 1958. 75 B.L.J. 1069.

Where a conditional sale contract was assigned and the assignee brought suit on it to recover the last payment due, the buyer could not avail himself of the defense that the conditional seller had improperly filed in the blanks of the contract by adding a provision for an eighteenth installment, since the assignee's purchase of the contract before maturity, for value and in good faith precluded the buyer from asserting defenses which might have been valid against the seller. Garnett v. Associates Discount Corporations, Mississippi Supreme Court, June 9, 1958. 75 B.L.J. 1068.

The designation "one" after the words

"special notes" on the face of a conditional sale contract does not constitute a separate promissory note for the balance due on the contract because there is nothing to indicate an independent promise to pay. Zeff v. Harvey Smith Oldsmobile Co., California District Court of Appeal, September 18, 1957. 75 B.L.J. 163.

SIGNATURE

§1370. Form of signature.

Person affixing his signature on notes directly under the name of a corporation but with no indication that he was signing as agent of the corporation is individually liable on the notes. Betz v. Bank of Miami Beach, Florida, 95 So.2d 891. 75 B.L.J. 239.

STATUTE OF FRAUDS

§1382. Liability under statute.

Where a car dealer orally misrepresented to a bank the price of an automobile and the amount of a purchaser's down payment, the bank was prevented by the Statute of Frauds from recovering from the dealer after the purchaser defaulted on his loan from the bank. The Statute of Frauds precluded recovery even though the misrepresentations of the dealer resulted in the dealer's benefit. Middlesex County National Bank v. Redd Auto Sales, Inc., Mass. 147 N.E.2d 790. 75 B.L.J. 855.

STATUTE OF LIMITATIONS

§1390. Note under seal.

A promissory note containing the seal of a corporate maker is not a sealed instrument subject to a 12 year statute of limitations where it was apparent that the intention of the corporation was not to create such an instrument but rather only to identify itself as maker. Sigler v. Mt. Vernon Bottling Co., United States District Court, District of Columbia, 158 F.Supp. 234. 75 B.L.J. 777.

§1392. Action on demand note.

Where words "demand after date" were used in a promissory note instead of "on demand after date" the note was a demand note on which the statute of limitations began to run as of the date of the note. The fact that the note contained a provision for the semi-annual payment of interest does not take it out of this general rule concerning the statute of limitations. Stebens, as Executrix v. Wilkinson, Iowa, 87 N.W.2d 16. 75 B.L.J. 608.

§1397. Action to recover payment on forged instrument.

The statute of limitations on a cause of action against a bank on a check bearing a forged indorsement begins to run as of the date the bank returns the cancelled check and renders its account showing the check charged against the account and not when the depositor discovers or establishes the fact of the forgery. Pappas v. Marshall & Ilsley Bank, Wisconsin, 86 N.W.2d 27. 75 B.L.J. 416.

STOCK AND STOCKHOLDERS

§1430. Right of stockholder to inspect books generally.

An appellate court will not grant bank stockholders the right to inspect the bank books in a mandamus proceeding brought only to compel the bank and its president to divulge information concerning only one account in the president's report. Bank of Giles County et al. v. Mason et al., Virginia, 98 S.E.2d 905. 75 B.L.J. 143.

STOPPING PAYMENT

§1470. Stopping payment of cashier's check.

A bank issuing a cashier's check in exchange for a worthless check, properly refused payment because of the failure of consideration where the cashier's check was in the hands of the original payee. The rights of a holder in due course were not involved. Dakota Transfer & Storage Co. v. Merchants National Bank & Trust Co., North Dakota, 86 N.W.2d 639. 75 B.L.J. 595.

§1476. Right of bank to recover money paid on stopped check.

Bank which inadvertently paid check after issuance of stop payment order may not recover proceeds of check from payee on basis that payment was made through mistake of fact. First National Bank of Chicago v. Molesky, Illinois, 146 N.E.2d 707. 75 B.L.J. 494.

SUNDAYS AND HOLIDAYS

§1478. Sunday contract.

In upholding the constitutionality of a special Sunday closing law in Indiana, the Supreme Court of that state has ruled that a conditional sale contract executed in the state on Sunday is not valid. The exchange of property as evidenced by instalment contracts is not compatible with

the spirit of the Sunday laws which are intended to induce rest, worship and relaxation on one day each week. Tinder v. Clarke Auto Co., Indiana Supreme Court, April 30, 1958. 75 B.L.J. 997.

## SURETIES

### §1484. Rights and liabilities of sureties in general.

A surety is subrogated to the rights of a corporation against a bank where the bank paid a check of the corporation to an agent who was not authorized to cash checks, since the equities of the bank were not equal or superior to those of the surety company because of the bank's negligent payment. Security Fence Co. v. Manchester Federal Savings & Loan Assn., New Hampshire, 136 A.2d 910. 75 B.L.J. 771.

## TAXATION

### §1531. Valuation for purposes of taxation.

The judgment of a lower court fixing the assessed valuation of property of a bank for ad valorem tax purposes, rendered on appeal and trial de novo from an order of the county equalization board denying the bank's protest to valuation as fixed by the assessor, will not be vacated on appeal for insufficiency of evidence to support it where the judgment is not against the weight of the evidence. Appeal of National Bank of Commerce of Tulsa, Oklahoma, 316 P.2d 175. 75 B.L.J. 496.

Where district court tried a case de novo involving assessment of bank property for purposes of determining ad valorem taxes and in so doing over-ruled the assessor and the findings of a board of equalization, an appellate court will not vacate the district court's decision for insufficiency of the evidence when the decision is not against the clear weight of the evidence. Appeal of National Bank of Tulsa, Okla., 312 P.2d 495. 75 B.L.J. 126.

## TRUST RECEIPTS

### §1562. Trust receipts.

An order blank for goods executed by the president of the trustee company (purchaser) who executed a Statement of Trust Receipt Financing at the same time, is "equivalent in all respects to a trust receipt" under the Illinois Uniform Trust Receipts Act, Ill. Rev. Stat. 1955, Chap. 12½ 169. In the Matter of LeVee Co., United States Court of Appeals, Seventh Circuit, February 10, 1958. 75 B.L.J. 765.

In a trust receipt transaction where the trustee refused to return motor vehicles covered by the trust receipt and also refused to account for the proceeds of sale of the vehicles, the trustee was in default and the entruster was entitled to repossess not only all of the vehicles covered by the trust receipt but also all vehicles received as trade-ins for the covered vehicles and the vehicles purchased by the trustee with the proceeds of sale of the covered vehicles. Universal C.I.T. Credit Corp. v. Swets, United States District Court, N.D. Illinois, April 18, 1958. 75 B.L.J. 996.

Where a wholesaler and retailer arranged a trust receipt financing with a finance company covering goods which the retailer had in stock for a year, the trust receipt was not valid against the retailer's trustee in bankruptcy and the wholesaler was liable to the finance company for misrepresenting that there had been a present delivery of goods. B-W Acceptance Corp. v. Banjamin T. Crump Co., Virginia Supreme Court, 99 S.E.2d 606. 75 B.L.J. 73.

## USURY

### §1564. What constitutes usury.

In Arkansas the extension of credit for the sale of merchandise is usurious where a carrying charge in excess of 10% of the total cash purchase price was added to the sale price. Sloan v. Sears, Roebuck & Co., Supreme Court of Arkansas, December 23, 1957. 75 B.L.J. 441.

Where a buyer was quoted only a cash price as the purchase price of a vehicle and then, when financing the purchase, was charged another price, a court ruled there was no valid time price given but rather only a cash price and a usurious loan McNish v. General Credit Corp., Nebraska Supreme Court, 83 N.W.2d 1. 75 B.L.J. 74.

No usurious loan was involved where the seller of a motor vehicle quoted both a cash price and a time price and the buyer was given the opportunity to choose between them when purchasing the vehicle. McNish v. Grand Island Finance Co., Nebraska Supreme Court, 83 N.W.2d 13. 75 B.L.J. 74.

### §1565. —Transactions held not usurious.

An opinion by the Attorney General of Pennsylvania indicates that a default charge written into a contract for the sale of goods on credit which equals more than the legal rate of interest in the state does not violate the state's usury law. Opinion of Attorney General of Pennsylvania, No.

85, March 19, 1958. 75 B.L.J. 997.

Where a promissory note accompanying a conditional sale contract contained provisions for a legal rate of interest, a charge of interest on interest after maturity and a 5% late charge, the contract was not usurious because there was no intent to circumvent the usury laws. There was only an intent that the note should be paid when due and if this occurred, the interest rate would not have exceeded the rate set by law. Camilla Cotton Oil Company v. Spencer Kellogg and Sons, Inc., United States Court of Appeals, Fifth Circuit, June 30, 1958. 75 B.L.J. 1069.

In Mississippi, where the parties to a time price contract act in good faith, the fact that the difference between the cash price and the time price exceeds the legal rate of interest does not make the contract void on the grounds of usury since this differential is not considered to be interest. Bryant v. Securities Investment Co., Mississippi Supreme Court, May 19, 1958. 75 B.L.J. 996.

**§1569. —Commission, bonus, expenses, etc.**

The United States Court of Appeals in the District of Columbia has ruled that where a borrower indicated approval of the payment of a 1% commission to a lending bank by signing a settlement sheet showing the commission and interest at 6%, there was no violation of the usury statute which permitted interest up to 8% if the contract calling for such is in writing. Since the settlement sheet constituted a "writing", the borrower could not rely on the statute prohibiting oral contracts for interest of over 6%. Industrial Bank of Washington v. Page, United States Court of Appeals, District of Columbia, 249 F.2d 938. 75 B.L.J. 780.

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